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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 586

WOOD, WIRE AND METAL LATHERS INTERNATIONAL UNION, AFL-CIO,

EMPLOYING METALLIC LATHERS ASSOCIATION OF GREATER NEW YORK AND VICINITY,

EMPLOYING LATHERS ASSOCIATION OF CHICAGO,

CONTRACTING PLASTERERS AND LATHERS INTERNATIONAL ASSOCIATION, *Petitioners,*

v.

JOHN T. DUNLOP, Individually and as Impartial Chairman of the Appeals Board, etc., et al., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Wood, Wire and Metal Lathers International Union, AFL-CIO, Employing Metallic Lathers Association of Greater New York and Vicinity, Contracting Plasterers and Lathers International Association, and Employing Lathers Association of Chicago, pray that a writ of certiorari issue to review the opinion and judgment (Appendix B, pp. 2a-6a, *infra*), of the United States Court of Appeals for the District of Columbia, entered in the above cause on July 28, 1967. This Court has jurisdiction under 28 U.S.C. § 1254(1).

OPINIONS BELOW

The opinion of the District Court (Appendix C, pp. 7a-9a, *infra*) is unreported. The opinion of the Court of Appeals is not yet officially reported.

QUESTIONS PRESENTED

The 1965 "Plan For Settling Jurisdictional Disputes Nationally and Locally" incorporates certain appended "agreements and decisions of record," which are "recognized" as "operative" under the Constitution of the Building and Construction Trades Department, AFL-CIO. Article III, Section 5, of the Plan empowers the Joint Board to refer to a Hearings Panel for "a national decision" which will become "of record" a repetitive dispute which the Board finds not "governed by a decision or agreement of record." The Plan does not declare final or binding a finding that an agreement or decision of record does not govern.

The Joint Board referred for national decision a repetitive dispute between Lathers and Carpenters over ceiling systems. Work on ceiling systems is clearly covered by an appended agreement and decision "of record." The Board found that this agreement and decision do not "govern" the dispute because they are not "recognized", inasmuch as they had been unilaterally denounced and effectively flouted by Carpenters, and had been deemed inoperative by the Board prior to 1965. The court below held that the Joint Board is authorized to find that the agreement and decision of record, although applicable to the dispute, do not "govern" or "control" it.

The questions presented are:

(1) Whether Article III, Section 5, may properly be construed as authorizing arbitrators to nullify the

recognition accorded by the contracting parties to applicable "agreements and decisions of record"?

(2) Whether construction vesting power of nullification in arbitrators is required by *United Steelworkers of America* v. *Warrior and Gulf Co.*, 363 U.S. 574, 582, or condemned by *Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593, 597 and *Humphrey* v. *Moore*, 375 U.S. 335, 345, n. 8, and accompanying text?

STATUTE INVOLVED

Section 301 of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C.A. § 185, is set out in Appendix A, *infra*, p. 1a.

STATEMENT

Petitioners, the Lathers' Union, an affiliate of the Building and Construction Trades Department, AFL-CIO, hereinafter referred to as the Department, and various employer associations who employ lathers, sued to enforce the agreement between the Department and various parent employer associations for settling jurisdictional disputes in the building and construction industry. The agreement, published by the Department in the form of a "Green Book" (Appendix D, *infra*, p. 10a, Tab 3),[1] is known as the "Plan For Settling Jurisdictional Disputes Nationally and Locally."

[1] The record certified to this Court is in three parts, one containing the decision and relevant orders of the Court of Appeals; the other two consisting of the record in the trial court, including pleadings, decisions, orders, affidavits and exhibits, tabbed to facilitate reference. References herein are to the tabs; where more than one document is contained in a tab, the number in parenthesis following the tab reference herein is to the order in which the document is filed in the tab.

The Plan is grounded upon and incorporates a "record" consisting of "[a]ll agreements and decisions recognized under the provisions of the Constitution of the Building and Construction Trades Department" (Art. III, Sec. 1(c), p. 6).

The Constitution of the Department, as revised in 1957 and amended in 1965, provides in its Preamble (Tab 4, pp. 2-3):

> "Mindful of and grateful for the fine traditions of our past, and in recognition of the sincere efforts of our predecessors, and to give continuity and perpetuity to our charters, history, records, agreements of record, decisions and previous Constitutional rights, we do herewith carry forward, adopt and give full recognition to all previous A. F. of L. Executive Council and Convention actions and decisions, Building and Construction Trades Department Executive Council and Convention actions and decisions, and all official decisions, rulings and agreements of record, decisions of referees and jurisdictional boards, including all rights derived from the charter grants and from previous Constitutional provisions regarding jurisdiction and other matters *as presently recognized by the Building and Construction Trades Department.*" (Emphasis added.)

Agreements and decisions of record "presently recognized by the Department" are printed in the "Green Book" under the rubric "JURISDICTIONAL AGREEMENTS ENTERED INTO BETWEEN AFFILIATED INTERNATIONAL UNIONS AND DECISIONS RENDERED AFFECTING THE BUILDING INDUSTRY *That are Held to be Operative By the Building and Construction Trades Department*" (App. D, *infra,* p. 11, emphasis added.)

The Plan establishes different policies and tribunals for disposition of jurisdictional disputes on a "job" or "locality" basis, and on a "national basis." The role and significance of an applicable agreement or decision of record varies with the scope of proposed disposition. Such agreements and decisions are to be considered in making job or locality decisions; but, if they are in conflict with "established trade practice" or "prevailing practice in the locality," they need not be controlling.[2] On the other hand, an applicable agreement or decision of record bars reallocation of jurisdiction on a national basis (Tab 39, pp. 2-3); the condition precedent to national decision, which only a Hearing Panel is empowered to make, is a finding by the Joint Board that the "issue [is] not already determined on a national basis by a decision or agreement of record" (Art. III, Sec. 2, p. 7), or that the "repetitive dispute * * * [is] not * * * governed by a decision or agreement of record" (Art. III, Sec. 5, p. 8).

Under predecessor versions of the Plan, adherence to applicable agreements and decisions of record was required even on a job and locality basis (Tab 39).

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[2] Article III, Sec. 1(a) of the Plan (p. 6), provides:

"In making a job decision the Joint Board shall utilize the following criteria: Decisions and agreements of record as set forth in the Green Book, valid agreements between affected International Unions attested by the Chairman of the Joint Board, established trade practice and prevailing practice in the locality.

(b) The Joint Board may at its discretion hold oral hearings on repetitive disputes for the purpose of rendering a decision applying in the locality as defined by the Board."

The immediate predecessor, the 1963 Plan (Tab 31, p. 6; Tab 34, pp. 3-5), provided:

"ARTICLE III

Sec. 1. (a). *Joint Board Procedure.*—When dispute is filed, the Joint Board shall in all cases first investigate the claims of the disputing parties to determine whether or not *a disposition thereof has been made by a previous decision of record or by recorded agreement* between the parties to this dispute and issue a ruling as to the decision or the agreement *governing* in the case, and determining which one of the parties to the dispute has a rightful claim to the work under the agreement or decision of record. In repetitive cases in the same area, the Board, at its discretion, may apply such ruling in the area as defined by the Board.

(b) If the Joint Board finds that the dispute *is not covered by a decision or agreement of record,* it shall render a job decision, in which the Board should consider the established trade practice, and such job decision shall be effective on the particular job only on which the dispute occurred.

(c) The Joint Board may at its discretion hold oral hearings on repetitive disputes *not governed by a decision or agreement of record* for the purpose of rendering a decision applying in the area as defined by the Board." (Emphasis added.)[3]

When, in 1965, the sponsoring parties lifted the requirement of adherence to agreements and decisions of

[3] As appears from the italicized phrases, the term "governed" means that the rival claims had been "previously disposed of," or that their subject matter had been "covered" by a decision or agreement of record. The 1963 Rules and Regulations of the Joint Board reflect understanding that a decision or agreement of record "governs" a dispute if it is "applicable to" or "covers" the work. (Tab 32, pars. 3(b), 7(a) and (b), pp. 4, 12-13).

record in job and locality decisions, they readopted in *haec verba* the language barring reallocation by national decision of work covered by agreements or decisions of record.[4] Accordingly, a finding by the Joint Board that no agreement or decision of record is "applicable to" or "covers" the work remains, under the 1965 Plan, the condition precedent for referral of a dispute for national decision. In contrast to other provisions of the Plan, there is no provision making a finding by the Joint Board that an invoked agreement or decision does not govern final or binding.[5]

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[4] The evident rationale for allowing deviation from an applicable agreement or decision on a job or locality basis, but not on a national basis, is that the former have only ephemeral or limited geographic effect; they do not become "part of the record referred to in Article III, Section 1(d) of [the] Plan" (App. D, Art. II, *infra*, Sec. 5, p. 6). In contrast, national decisions do become "part of the record" (Art. III, Section 2, p. 7), and would therefore repeal or supersede an agreement or decision of record covering the same subject matter.

[5] Article II, Section 5 (App. D, *infra*, p. 5), which empowers the Appeals Board to review and decide appeals from a "decision or ruling of the Joint Board," provides that the decision of the Appeals Board shall be final. This provision does not apply to a finding by the Joint Board under Article III, Sections 2 and 3, for such a finding precedes reference of a case to a Hearings Panel and is not appealable to the Appeals Board. For the same reason, the provision in Article III, Section 7 (App. D, *infra*, p. 9), that "[a]ny decision or interpretation by the Joint Board shall be immediately accepted and complied with * * * unless an appeal is taken to the Appeals Board" is inapplicable. The provision in Article III, Section 7 (App. D, *infra*, p. 9), that "[d]ecisions of the Hearings Panel * * * shall be immediately accepted and complied with by all parties to this Agreement" obviously applies only to decisions resulting from an authorized reference by the Joint Board. Compare the much more comprehensive finality provisions in the Automobile Carrier Truckaway Agreement, which this Court in *Humphrey* v. *Moore*, 375 U.S. 335, 338-339, 345, n. 8, found ambiguous.

On November 24, 1965, over Lathers' objections, the Joint Board referred to a Hearing Panel for national decision jurisdictional disputes between Lathers and Carpenters "over installation of nailable and screwable metal studs, including floor and ceiling runners, to receive drywall and installation of ceilings systems." The reference was predicted upon a finding, subsequently adopted by the Hearing Panel, that "there is no *recognized* decision or agreement of record covering the items in dispute." (Emphasis added; Tab 52, App. E, p. 10a, *infra;* Tab 28, p. 17).

The "items in dispute" are plainly "covered" by a 1903 "agreement of record" between Lathers and Carpenters which allocates jurisdiction on the basis of the character of the components being installed—wood to Carpenters and light iron to Lathers—and by a 1920 "decision of record," binding on all affiliated unions, which allocates metallic lathing of all descriptions to Lathers (App. D, pp. 17, 87).[6] The Board did not find to the contrary. Instead, as noted below (App. B,

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[6] In 1917, the President of the Department declared "the suspension of ceilings to receive iron or metal lath is properly the jurisdiction" of Lathers and "is not Carpenters' work but Lathers" (Tab 11).

It is undisputed on the record that the art of suspending ceilings from roof structures by light iron hangings and furring has not changed in well over half a century. Such changes as have occurred have involved merely the style or shape of the metal components, not their installation. These style changes in no way altered the character of that work (Tab 39, pp. 5-6, Tab 40, Tab 29, pp. 4-5, Tab 35, pp. 6-8).

In the late 1920's acoustical tile began to be substituted for plaster as the predominant finish for ceiling systems (Appendix D, *infra*, Celotex agreement, pp. 17-18, Tab 36, App. A, decision (f)). This substitution involved replacement of plasterers by carpenters for the work of installing the finish, but it did not involve any change in the lathing function, that is, in the work of installing the light iron components to receive the backerboard or acoustical tile finish (Tab 35, pp. 6-8; Tab 39, pp. 5-6, Tab 40, Exhs. 17-19).

p. 4a), it "reviewed the history of the dispute between the Lathers and Carpenters" and concluded that the 1903 agreement and 1920 decision are not a bar because they are not "recognized." Concededly, this amounts to holding that the agreement and decision are not "part of the record" (Tab 26, p. 26).

The "history of the dispute" consists of repeated attempts by the Carpenters' Union since 1928 to disavow and unilaterally terminate the 1903 agreement (Tab 34, p. 4; Tab 12; Tab 13; Tab 14).[7] Carpenters contended that the agreement was only "temporary"; that it had not been approved at the Carpenters convention of September 19, 1904; and that it had been subsequently "abrogated" by Carpenters (Tab 41, pp. 1-2; Tab 23, p. 1). On this basis, Carpenters repeatedly demanded, in 1937, 1951 and 1961, that the Department delete the agreement from the Green Book (Tab 15(1); Tab 20(1); Tab 24). The Department considered and rejected these contentions, declaring that it is a "legal agreement" (Tab 15 (2)); that it is "recognized by the * * * Department" (Tab 16); and that it "has been in full force and effect since [1903] and is the guide for the Department" (Tab 16(2)). Recognition under the Department Constitution has never been withdrawn and the 1903 agreement and 1920 decision have been published in every edition of the Green Book, including 1965. (Tab 14(2), Tab 15, Tab 16(2), Tab 17, Tab 39, 1-2).

Prior to 1957, the Joint Board applied the 1903 agreement and the 1920 decision (Tab 18(1), (2), (3);

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[7] According to respondents, "Carpenters have refused to recognize the validity of the 1903 agreement at least since 1928" (Tab 34, p. 4).

Tab 21(2), (3); Tab 22(1); Tab 46, Exhs. 1-6). Beginning approximately in 1957, however, the Board, in job decisions, approved contractor assignments of Lathers' ceiling system work to Carpenters. Respondents explained below that the Board had adopted Carpenters' contentions concerning the 1903 agreement:

> "On August 14, 1959, the then Chairman of the National Joint Board, Mr. R. J. Mitchell, advised President Richard J. Gray of the Building and Construction Trades Department of the reason for the position of the Joint Board with respect to the agreement appearing on Page 17 of the Green Book. Mr. Mitchell stated:
>
> > 'This agreement was not approved at the Carpenters' convention of September 19, 1904, and copies of correspondence between the Carpenters and the Lathers which are in the files of the National Joint Board, confirm the abrogation of this agreement.'" (Tab 41, pp. 1-2).

According to respondents, the same rationale underlies the Board's finding in this case that the 1903 agreement and 1920 decision are not "recognized" (Tab 41, pp. 1-2).

In practice, in most areas of the country, a preponderance of ceiling system work to which Lathers is entitled under the 1903 agreement and 1920 decision is allocated to and performed by Carpenters and carpenter contractors (Tab 28, pp. 16, 18). In other areas, however, particularly in metropolitan centers where local boards operating pursuant to Article IV of the Plan (App. D, p. 9), have continued to honor the Department's recognition of the 1903 agreement

and 1920 decision, the work has always been and continues to be allocated to Lathers (Tab 29, pp. 1-5, 7; Tab 35, pp. 2-6, 8; Tab 36, pp. 1-3). Under the criteria set forth in the Plan, note 2, p. 5, *supra,* in these areas Lathers' work could not be transferred to Carpenters by job or locality decision. Reallocation on a national basis circumvents this limitation.

The Joint Board and the Hearing Panel assumed that the Joint Board is not bound under Article III, Section 5, by the contracting parties' incorporation in the "record" of agreements and decisions "recognized" under the Department Constitution. The only explanation offered was that to hold otherwise would (Tab 6, pp. 12-13):

> "preclude the clarification, interpretation or modernization of any agreement or decision of record. In an industry with rapid technological and product changes and many old jurisdictional rules, such an interpretation would constitute a severe frustration of the jurisdictional machinery not contemplated by the Plan."

The Hearing Panel thereupon reallocated all ceiling system work on a national basis, assigning "the bulk" of Lathers' work to Carpenters (App. B, *infra,* pp. 2a, 4a; Tab 28, pp. 20-21).

The court below, without examining the contracting parties' purpose in retaining the finding requirement in Article III, Sections 2 and 5 (p. 6-7, *supra*), without considering the meaning of the term "governed" as used historically in the Plan (p. 6, *supra*), and without explanation other than citation of *Warrior & Gulf* (App. B, p. 6a, *infra*), upheld the arbitrators.

REASONS FOR GRANTING THE WRIT

1. In *Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593, 597, this Court held that "an arbitrator is confined to interpretation and application of the * * * agreement; he does not sit to dispense his own brand of industrial justice. * * * When the arbitrator's words manifest an infidelity to [the] obligation [to be bound by the agreement] courts have no choice but to refuse enforcement of the award." Here, although the words of the Joint Board and the Hearing Panel plainly manifest infidelity to the contracting parties' continued "recognition" of the 1903 agreement and 1920 decision, the courts enforced the award.

In holding that authority to determine whether an agreement or decision of record "governs" imports power to override and supersede the contracting parties' "recognition" the courts below disregarded the approach and teaching of *Humphrey* v. *Moore*, 375 U.S. 335, 345-348.[8] Authority to determine whether an agreement or decision of record "governs" is necessarily limited by the terms, context and history of the Plan; it is authority to interpret and apply the Plan, not rewrite it by reversing the contracting parties' own acts. Whether the 1903 agreement and 1920 decision are "recognized" is resolved finally by the Plan itself; that is not an "issue" (*Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241) the contracting parties left open for the arbitrators to

[8] The district court rejected *Humphrey* because its analysis of Section 5 of the Motor Carrier Agreement as limiting the arbitrators' authority to cases of "absorption," judicially defined, appears in a footnote and because there the arbitrators were upheld (App. C, p. 7a, *infra*). The court below did not even mention *Humphrey*.

decide. Since denial of recognition was the predicate of the arbitrators' finding that the agreement and decision do not "govern," the finding was clearly unauthorized.[9] Since denial of "recognition" renders "inoperative" an agreement and decision the Plan declares "operative", (p. 4, *supra*), the effect is to rewrite the Plan.

In its failure to evaluate the grounds for and the effect of the finding against the relevant text and texture of the Plan, the decision below is in square conflict with other circuits. *Torrington Co.* v. *Metal Products Workers Union,* 362 F.2d 677, 680, 682 (2 Cir.); *H. K. Porter Co.* v. *United Saw, File and Steel Prod. Wkrs.,* 333 F.2d 596, 601-602 (3 Cir.); *International Ass'n of Machinists* v. *Hayes Corporation,* 296 F.2d 238, 243 (5 Cir.); *Kansas City Luggage & Nov. Wkrs.* v. *Neevel Luggage Mfg. Co.,* 325 F.2d 992, 993 (8 Cir.); cf. *Local Union No. 721, United Packinghouse, Food and Allied Workers* v. *Needham Packing Company,* No. 381, this Term.

The requisite analysis, eschewed below, shows that the only conceivable purpose relevant to Article III, Section 5, for compiling a "record" of "recognized" agreements and decisions is to exclude work covered by such agreements and decisions from redistribution by national decision. The contracting parties obviously intended, *pro tanto,* to protect jurisdictional allocations *they* recognized. Their purpose and object is "effectively emasculated" (*Humphrey, supra,* 375 U.S. at 337) by holding that a dispute "covered"

[9] The question presented is therefore totally different from that which would arise if the Board had found that because of technological changes in the work or jobs, the agreement and decision of record do not cover or apply to ceiling systems. Cf. *Transportation Union* v. *U. P. R. Co.,* 385 U.S. 157, 161. See n. 7; p. 8, *supra.*

by an agreement or decision of record is nevertheless not "governed" thereby.

Moreover, to distinguish "covered" from "governed" defeats the parties' usage and understanding of the terms as interchangeable (p. 6, n. 3, *supra*). Further, to say that an agreement or decision of record does not "govern" because it does not avert repetitive disputes encourages defiance and disregard of decisions and agreements of record by subject parties, subverting the very "essence" (*Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593, 597) of the Plan. Since Article III, Section 5, applies only to repetitive disputes, to hold that continuing strife may make an applicable agreement or decision not "controlling" (App. B, p. 6a), nullifies the limitation in all cases.

Finally, to hold that the Board is authorized to find that an applicable agreement should not be recognized for reasons actually considered and rejected by the Department itself (p. 9, *supra*), is to make the arbitrators master rather than servant of the contracting parties.

The provisions of the Department Constitution cited below (App. B, pp. 3a-4a), cannot be construed as transferring from the Department to the arbitrators authority to determine whether an agreement or decision of record should continue to be recognized by the Department. Article X authorizes adjustment and settlement of jurisdictional disputes only "according to the" Plan. Settlement or adjustment by usurpation of power to refuse recognition of an agreement and decision "presently recognized by the * * * Department" (p. 4, *supra*), is not "according to" the Plan. The provision that "all" jurisdictional disputes shall be settled and adjusted in accordance with the Plan in no way militates against enforcement of the ban against

reallocation of jurisdiction on a national basis, for that limitation permits resolution of any dispute on a job or locality basis, "according to" the Plan.

2. Neither the desirability of promoting settlement of jurisdictional disputes by arbitration nor the assumed desirability of authorizing arbitrators to "modernize" jurisdictional allocations can justify allowing arbitrators to usurp authority under the guise of interpretation and application. Since the prohibition of reallocation of jurisdiction by national decision in areas covered by agreements and decisions of record is substantive, not procedural, the policy of judicial abstention in procedural controversies (*Sheet Metal Workers' International Union* v. *Aetna Steel Prod. Corp.*, 359 F.2d 1 (1 Cir.), cert. denied, 385 U.S. 839, cited below, App. B, p. 6a, n. 2), is inapposite. The opinions below demonstrate the need for illustrating, by concrete application, that the *Humphrey-Enterprise* approach is not inconsistent with or subordinate to *Warrior & Gulf* and *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 558. See Hays, *Labor Arbitration, a Dissenting View* (Yale University Press, 1966), pp. 79-83.

3. By divesting protection from agreements and decisions of record, the opinion below unsettles jurisdictional allocations throughout the building trades, contrary to the Department Constitution and without consent of the affected unions and contractors. The effect is to incite raiding of weaker unions by more powerful rivals,[10] promoting jurisdictional strife. The nationwide magnitude of the Plan and the substanti-

[10] The membership of Lathers is 16,200; that of Carpenters 760,000. *Directory of National and International Labor Unions in the United States, 1965* (Bull. No. 1493, U.S. Dept. of Labor).

ality of the interests affected enhance the importance of resolution by this Court of the questions presented.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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